Vet.App. No. 01-1489
VA File No. CSS XXX XX XXXX

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROQUE A. ACOSTA
Appellant,

V.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,
Appellee.

ON APPEALFROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE

SECRETARY OF VETERANS AFFAIRS

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	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 01-1489
	)	
ANTHONY J. PRINCIPI,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

_____

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

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BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

1. Whether there is a plausible basis for the June 5, 2001, Board of Veterans' Appeals (BVA or Board) decision that denied entitlement to an effective date prior to February 3, 1995, for the grant of service connection for a chronic acquired psychiatric disability.

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

Appellate jurisdiction is predicated on 38 U.S.C. § 7252.

B. NATURE OF THE CASE

Appellant appeals the June 5, 2001, Board decision that denied entitlement to an effective date prior to February 5, 1995 for a grant of service connection for a chronic psychiatric disorder. The Secretary notes that a January

1998 BVA decision determined that Appellant failed to file a timely substantive appeal as to the March 1983 rating decision that declined to reopen his previously denied claim of service connection for a chronic mental disorder and that the 1983 rating decision was therefore final. Additionally, the 1998 Board decision further found that Appellant had submitted new and material evidence to reopen his claim. A September 1998 rating decision granted service connection for Appellant's psychiatric disability with an effective date of February 3, 1995, the date Appellant submitted his claim to reopen. Appellant seeks an effective date of 1982; the date that his initial claim of service connection was first submitted.

C. STATEMENT OF RELEVANT FACTS

Appellant had active duty for training from August to November 1975, and active military service from May 1976 to May 1979. (R. at 14, 15). In September 1982, Appellant submitted a claim of service connection for a psychiatric disorder, which was denied in a December 1982 rating decision. *(Not contained in the record, but see* R. at 5, 111, 554). Appellant submitted a claim to reopen in December 1982. *Id.*

In March 1983, the Department of Veterans Affairs (VA) Regional Office (RO) denied Appellant's claim based upon a review of the evidence of record and determined that his disability was not incurred in service as shown by the absence of any in-service treatment or symptomatology of a chronic mental disorder. (R. at III). Appellant's notice of disagreement (NOD) was timely submitted through counsel in March 1984, (R. at 209, 211), and a Statement of the Case (SOC) (with attached cover letter and VA Form 1-9), was issued May 1, 1984, and sent to Appellant's last known address of record. (R. at 215-17). The SOC advised Appellant that failure to submit an appeal to the BVA within 60 days would result in his claim being closed; he was further informed that if he needed

additional time to submit his appeal he should contact the RO to request an extension of time. *Id.* By an unsigned June 1984 letter received by the VA regional Office (RO), Appellant referred to the May 1984 SOC*,* and stated that he was in the process of securing evidence in support of his claim and requested "additional time" to prepare his "case," and that he would submit additional evidence as soon as it became available. (R. at 219). No further correspondence was received from, or on Appellant's behalf, until April 30, 1985, at which time he submitted to the RO documents unrelated to his service connection claim; no mention was made of any claim of service connection for any disability. (Not contained in the record*, but see* R. at 6). As a result, the March 1983 rating decision became final.

On February 3, 1995, Appellant inquired about his "current disability status," which the RO construed as an application to reopen his previously disallowed claim of service connection for chronic acquired psychiatric disability. (R. at 223). In May 1995, the RO responded with a letter to Appellant advising him that he needed to submit new and material evidence to reopen his previously denied claim, and that such "(**m]aterial evidence would be statements from doctors who treated you during or shortly following service**." (R. at 232) (emphasis in original). He was further advised that he could submit statements from laypersons that served in the service with him or knew of his disability at the time of its incurrence. *Id.* Appellant submitted statements from former service members, (R. at 238, 239), and family members. (R. at 240, 241, 242, 247-54).

In an October 1995 rating decision, the RO declined to reopen Appellant's claim for service connection for a chronic acquired psychiatric disability. (R. at 257-58). Appellant perfected a timely appeal to the Board. (R. at 261). In May 1996, the RO issued an SOC (R. at 266-74), advising Appellant that "a person shall have the burden of submitting evidence" that establishes a nexus between

military service and a current disability. (R. at 269). He was further informed that because his claim was previously denied, he was required to submit evidence that was new and material, "evidence not previously submitted or available to the agency . . . which bears directly or substantially, . . . is so significant that it must be considered in order to fully decide the merits of the claim." (R. at 269).

In his substantive appeal, Appellant stated that when he initially filed his claim of service connection for a mental disorder in 1983, he was significantly impaired due to his mental disability. (R. at 276-77). In conjunction with his appeal to the Board, additional evidence was submitted including November 1996, (R. at 280-81), and July 1997, (R. at 309-310), opinions from his treating VA psychiatrist as well as a November 1996 RO hearing transcript. (R. at 283-300). A November 1996 Supplemental Statement of the Case (SSOC), again advised Appellant that it was his burden to submit new and material evidence to reopen his claim. (R. at 302-304). Also contained in the record is a July 1997 Travel Board hearing transcript. (R. at 31 2-33).

Based on all the evidence of record, a January 1998 BVA decision explicitly determined that Appellant did not perfect a timely appeal to the March 1983 rating decision, which denied service connection for a psychiatric disability, and determined that the March 1983 rating decision was final. It was stated: "Most recently, in a March 1983 rating decision, the RO denied the veteran's claim again. . . . The veteran was notified of the decision and *he did not file a timely appeal.* As a result, the March 1983 decision subsequently became final one year later." (R. at 335; *see also* R. at 336-37) (emphasis supplied). The Board found, however, that new and material evidence had been submitted in support of Appellant's claim to reopen and the BVA reopened the claim and remanded it to the RO for additional development of the evidence. (R. at 337). The record does not contain any notice of appeal (NOA) to the Court, as to the

1998 Board's determinations that Appellant failed to timely file a substantive appeal or that the March 1983 rating decision was final.

Subsequent to the January 1998 Board remand, numerous additional records including medical treatment records (R. at 353, 360-61, 362-64), and lay statements, (R. at 347, 348), were submitted into the record. Such records also included September 1982 records from the San Jose Police Department, (R. at 368-72), as well as March 1998 letters from Appellant's spouse and sister (suggesting that he had a psychiatric disability since service), and VA, (R. at 396-531), and private medical records from July 1982 to September 1998, portions of which were duplicate copies of previously submitted documents. (R. at 373-83).

In a May 1998, letter, Appellant acknowledged that he had been advised by the RO in May 1998 that it was his responsibility to "furnish records from the San Jose Police Department as well as the Santa Clara Valley Mental Health" facility. (R. at 386). Appellant also indicated that he had forwarded all available records and that he had provided the location of all relevant records:

> I have now forwarded all the records to you that I believe I can remember as of now. I have done all I can to locate from all the places that may have medical records regarding my illness.
>
> Because request for medical records from hospitals have now went beyond the time they maintain such records in their files, some of these places only have dates of my visits to these hospitals.

Id.

A June 1998 VA letter to Appellant advised him "it is your responsibility to make sure the records are sent" relating to his treatment at the Martin Luther King Hospital. (R. at 388).

Appellant underwent a VA psychiatric examination in September 1998. (R. at 531-34). The examiner reviewed Appellant's claim file and noted that while

service medical records were silent as to any mental disorder,". . . the only question appears to be the date of onset [as to the psychiatric disability." (R. t 534). The examiner found Appellant credible as to his description of in-service symptomatology and further opined, "I believe it is at least as likely as not that the veteran's disorder began during service." *Id.* A September 1998 rating decision granted service connection for Appellant's chronic acquired psychiatric disability, effective February 3, 1995, the date of receipt of his application to reopen that claim; the disability was assigned a 70 percent rating from the effective date of the award of service connection. (R. at 538-541). Appellant disagreed with the effective date of the award of service connection, contending that the effective date should be from 1982, the date he initially filed his service connection claim, and in his November 1998 NOD, he suggested that he continuously pursued his appeal from the March 1983 RO rating decision, relative to the claim of service connection for psychiatric disability (because he filed a timely NOD in March 1984). (R. at 543).

The RO issued an SOC in June 1999, advising Appellant that "a person who submits a claim . . . shall have the burden of submitting evidence sufficient to justify a belief . . . that the claim is well-grounded." (R. at 556). Further, while the SOC advised Appellant that he had "the burden to submit evidence sufficient "to make his claim plausible and that the VA would assist develop the facts of his claims, such assistance was not to be construed by Appellant "as shifting from the claimant to the [VA] the responsibility to produce necessary evidence." *Id.* Appellant was also informed that the VA would request directly from the source evidence in the custody of the service department or another federal agency and that if authorized by Appellant, the VA would seek to obtain records maintained by state or local government, as well as private medical and other relevant records; if such efforts were unsuccessful, Appellant was advised that he had the

ultimate responsibility to obtain such records. *Id.*

At a February 2001 Travel Board hearing, Appellant and his spouse testified, essentially, that the effective date of the award of service connection for his psychiatric disability should be from the date he initially filed his service connection claim in 1982. (R. at 619). Appellant believed that this was the appropriate date for the award of service connection, because the entirety of the evidence ultimately showed that his disability had its onset in service, and because he disagreed, in a timely fashion, with the March 1983 RO rating decision, denying service connection for his disability. He also indicated that he never received a copy of VA Form 9, (*but see* R. At 219), which would allow him to perfect a timely appeal from the March 1983 unfavorable RO rating decision. *Id.* They indicated that his psychiatric disability imposed a significant burden on the entire family, making it necessary for them to move frequently, and preventing him from keeping VA informed of his whereabouts in a timely fashion. (R. at 619-21).

On June 5, 2001, the Board issued the decision on appeal. It denied entitlement to an earlier effective date for a chronic mental disorder. A timely appeal to this Court followed.

III. SUMMARY OF THE ARGUMENT

The BVA decision should be affirmed because there is a plausible basis in the record for the Board's decision, which denied an effective date prior to February 3, 1995, for Appellant's service-connected psychiatric condition.

The record shows that it was not factually ascertainable until 1995 when Appellant submitted new and material evidence that a causative link between his disability and service was demonstrated. The BVA reviewed the record and based upon its analysis plausibly concluded that there was no basis for an effective date prior to reopening of Appellant's claim. Under the facts of this

case, because the March 1983 rating decision is final, statutory and regulatory provisions mandate that the earliest date that can be granted for service connection of Appellant's disability is the date of receipt of his claim to reopen in February 1995.

Appellant's argument that the BVA failed to provide adequate reasons and bases as to its discussion of the issue of whether Appellant timely submitted a substantive appeal to the BVA disputing the March 1983 decision is without merit. The Board decision on appeal correctly noted that the issue was not before it, as the prior 1998 BVA decision had reviewed the issue on the merits and determined that a substantive appeal had not been timely submitted and that the March 1983 rating decision was final. Absent an appeal of the 1998 BVA decision which the record does not reflect, the issue of whether a timely appeal was submitted to the March 1983 rating decision may not now be addressed by the Court absent a claim of clear and unmistakable error adjudicated by the BVA.

Appellant's contention that the BVA failed to address the percentage of the disability evaluation is without merit, as Appellant clearly expressed dissatisfaction only with the effective date of the grant of service connection. The issue before the Board was the effective date of said award, as Appellant's NOD, formal appeal, and testimony to the Board expressly stated his dissatisfaction with the effective date of the grant of service connection, not the percentage of the disability evaluation.

IV. ARGUMENT

THE COURT SHOULD AFFIRM THE BVA DECISION DENYING ENTITLEMENT TO AN EFFECTIVE DATE PRIOR TO FEBRUARY 3, 1995, A GRANT OF SERVICE CONENCTION FOR APPELLANT'S PSYCHIATRIC DISORDER BECAUSE THE DECISION IS SUPPORTED BY A PLAUSIBLE BASIS IN THE RECORD.

A. The Board's decision has a plausible basis.

Pursuant to 38 U.S.C. § 5110(a), "the effective date for an award based on an original claim, a claim reopened after final adjudication, or a claim for increase of compensation . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application thereof." 38 C.F.R. § 3.400(r).

The BVA's determination of an effective date for disability compensation is a finding of fact, which the Court reviews under the "clearly erroneous" standard of review. *See Costa v. West,* 11 Vet.App. 102, 105 (1998); *see Williams v. Gober,* 10 Vet.App. 447, 451 (1997). If there is a plausible basis for the Board's factual determinations, the Court cannot overturn them. *See Costa,* 11 Vet.App. at 105; *Gilbert v. Derwinski,* 1 Vet.App. 49, 53 (1990).

Under this standard, the Court may not substitute its own judgment for a factual determination made by the BVA. "If there is a 'plausible' basis in the record for the factual determinations of the BVA, . . . [the Court] cannot overturn them". *Id. at* 53; 38 U.S.C. § 7261(a)(4).

The BVA's decision in this case has a plausible basis and is supported by the record and should be affirmed. The evidence reflects that it was not until Appellant's claim to reopen in February 1995 that new and material evidence was submitted showing that it was factually ascertainable that Appellant's psychiatric disability was related to his military service. Prior to this date, the lay statements, (R. at 238-42, 247-54, 347-48), and post-service treatment records (e.g., R. at 280-81, 353, 360-64, 396-529) reflected treatment and symptomatology of a mental disorder, but did not establish a link between Appellant's condition and his military service. Even after the September 1998 VA examination, (R. at 531-34), the evidence was not in preponderance in Appellant's favor, but it was in equipoise and pursuant to the benefit-of-doubt doctrine, he was granted service connection. *See* 38 C.F.R. § 3.102.

In his brief, Appellant argues that the BVA decision should be remanded because it lacks adequate reasons and bases as to the issue of whether Appellant filed a timely substantive appeal to the March 1983 rating decision. (Appellant's Brief [App. Br. at 4-9). Appellant has misconstrued the Board decision on appeal as having reviewed the issue of whether a timely appeal had been submitted to the March 1983 decision. It was the 1998 BVA decision, which adjudicated the issue, the 2001 Board decision on appeal merely related what had transpired in the record and determined as a result of the final 1998 BVA decision that the issue was not on appeal for adjudication. (R. at 10).

In its decision, the Board noted that the prior 1998 BVA decision explicitly determined that Appellant failed to submit a timely appeal to the March 1983 rating decision and that the decision had become final:

> On February 3, 1995, the veteran filed an application to reopen the claim of service connection for chronic acquired psychiatric disability. Although his claim had been denied by the RO in October 1995, by decision in January 1998, the Board found that new and material evidence had been submitted in support of the service connection claim. In addition to finding that the veteran submitted new and material evidence in support of his claim of service connection for chronic psychiatric disability, the Board determined, in January 1998, that his service connection claim was previously disallowed by the RO and not appealed in a timely fashion; the Board thus found that the March 1983 RO rating decision was final. *See* 38 C.F.R. § 20.203.

(R. at 7).

The June 5, 2001, Board decision on appeal did not adjudicate the issue of whether a timely appeal to the 1983 rating decision had been submitted; rather, it merely related that the prior 1998 BVA decision had adjudicated the issue of whether Appellant had submitted a timely appeal and found that he had not timely submitted such an appeal, and that as a result, the March 1983 decision

became final. As stated *supra,* Appellant misconstrues the Board decision on appeal, the record reflects that the 1998 BVA decision disposed of the issue of a timely appeal; otherwise, the reopening of Appellant's claim is meaningless and would be contrary to statutory framework relating to reopened claims. *See* 38 U.S.C. § 5108, 5110(a), 7104(b); *see also Sears v. Principi,* _____ Vet.App. ____, No. 99-1309, slip op. (Aug. 20, 2002), at 6 ("The statutory framework simply does not allow for the Board of Veterans' Appeals to reach back to the date of the original claim as a possible effective date for an award of service-connected benefits that is predicated upon a reopened claim. The rule of finality regarding an original claim implies that the date of that claim is not to be a factor in determining an effective date if the claim is later reopened.") The 2001 Board decision correctly found that the issue of a timely appeal to the March 1983 decision was not before it. (R. at 10).

The issue of whether an appeal to the Board was timely is a distinct and separate issue appealable to the BVA. *See* 38 U.S.C. § 7105(d)(3); 38 C.F.R. § 20.302(b); *Morgan v. Principi,* 16 Vet.App. 20, 23 (2002). Pursuant to 38 U.S.C. § 7266(a), in order for Appellant to obtain review of the 1998 BVA decision by the Court as to the issue of whether a timely appeal had been filed, that decision must be final and the person adversely affected by that decision must file a timely notice of appeal (NOA) with the Court. *See Bailey v. West,* 160 F.3d 1360, 1363 (Fed. Cir. 1998) (en banc). Appellant does not dispute the 1998 BVA decision's determination that he failed to timely appeal the March 1983 rating decision or its finding that said rating decision is final. As a result, it is clear that as to the issue of finality of the March 1983 rating decision and Appellant's failure to file a timely appeal, the 1998 BVA decision is final. To have been timely filed under 38 U.S.C. § 7266(a) and Rule 4 of the Court's Rules, an NOA generally must have been received by the Court (or, in certain

circumstances, be deemed so received) within 120 days after notice of the underlying final BVA decision was mailed. *See Cintron v. West,* 13 Vet.App. 251, 254 (1999). *But see Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed. 2d 435 (1990) (under certain circumstances equitable tolling of judicial-appeal period may be appropriate); *Bailey,* 160 F.3d at 1365 (Court held that equitable tolling could apply when VA's conduct misled claimant into "allowing the filing deadline to pass"); *Evans v. West,* 12 Vet.App. 396, 399 (1999). There is no NOA in the record as to the 1998 BVA decision and Appellant has not alleged any misleading conduct on VA's part.

Because the 1998 BVA decision found on the merits that Appellant failed to timely appeal the March 1983 rating decision, which therefore became final, the 1983 rating decision was subsumed by the 1998 Board decision and that decision may not be collaterally attacked absent a claim of clear and unmistakable error (CUE) by Appellant asserting that the 1998 BVA decision did not dispose of the issue of whether a timely appeal was submitted. *See* 38 U.S.C. §§ 5109A, 7111, 7251).

Pursuant to section 3.105(a) of title 38, Code of Federal Regulations:

> Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of [CUE] has the same effect as if the corrected decision had been made on the date of the reversed decision . . .

Because the March 1983 rating decision was adjudicated on its merits by the 1998 BVA decision, only by filing a CUE claim alleging that the decision

improperly disposed of the issue can Appellant disturb the 1998 BVA's determinations. *See* 38 C.F.R. § 20.1104 (1998); *see also Donovan v. West,* 158 F.3d 1377 (Fed. Cir. 1998) and *Dittrich v. West,* 163 F.3d 1349 (Fed. Cir. 1998). In *Donovan v. West, supra,* the Federal Circuit considered a situation in which a final, unappealed rating decision was reopened and adjudicated on the merits by the BVA. The Federal Circuit Court (Federal Circuit) held that an unappealed 1947 RO decision, subsequently reviewed *de novo* on the merits by the BVA in 1988, was subsumed by that BVA decision and, thus, not subject to a claim of CUE as a matter of law. *Donovan v. West*, 158 F.3d at 1381-82, *aff'g Donovan v. Gober,* 10 Vet.App. 404, 408-09 (1997). Similarly, in *Dittrich v. West,* the Federal Circuit affirmed the BVA's dismissal where a 1969 BVA decision reopened and fully readjudicated the same claim that was the subject of a 1960 rating decision. *See* 163 F.3d at 1353. It is clear that the 1983 decision has been subsumed by the 1998 BVA decision and absent a new claim, the Court cannot revisit the issue.

Appellant's assertion that the BVA erred by failing to address whether good cause has been shown to extend filing date requirements is without merit, (App. Br. at 8), as shown *supra,* it is the 1998 BVA decision that adjudicated the issue of timely submission of a substantive appeal, and subsumed the March 1983 decision. Therefore, until such time as there is a final BVA decision addressing the issue of CUE, as to the 1998 BVA Board decision, the Court lacks jurisdiction to review any issues attendant to that rating decision.

Appellant alleges that the Board improperly failed to review the rating percentages granted to Appellant in the September 1998 rating decision and that the RO failed to issue an SOC as to this alleged claim. (App. Br. at 9). Appellant's reference is to his VA Form 21-4138, dated February 2, 1999. (R. at 571). The Secretary notes that Appellant's November 6, 1998, NOD relates only

to a claim for an earlier effective date, (R. at 543), as well as his February 19, 1999, VA Form 1-9, appeal to the Board. (R. at 580). On February 14, 2001, before the BVA, Appellant's representative characterized the issue as one of an earlier effective date. (R. at 612). However, the RO issues an SOC if the matter remains unresolved after an NOD. 38 U.S.C.S. § 7105(d)(1). As required under 38 U.S.C.S. § 5104(b), notice of a VA decision must include a statement of reasons for the decision and a summary of the evidence considered by the VA. Such notice, which a veteran receives before the NOD filing deadline, provides a veteran with enough information to support a NOD, namely a letter reasonably construed as disagreement with a desire for appellate review. 38 U.S.C.S. § 7105(b)(1).

As shown by the record, the issue as noted in Appellant's NOD is a disagreement with the effective date assigned to the grant of service connection. In this case, the actual words of Appellant's November 1998 NOD and the context in which they were written, should be interpreted by the Court as indicating disagreement only with the effective date of the September 1998 disability rating, and thus not an NOD as to the percentage of that disability rating. Appellant's NOD, his formal appeal to the Board, and the statement of his representative, as well as Appellant's testimony before the Board, all address only, and very specifically, the effective date issue. There is no justification for a more liberal reading of the NOD than that expressed in its plain words. Further, the NOD was not so vague and general as to necessitate a broad construction, which would include interpreting the NOD as contesting the 70% rating itself, rather than its effective date. *See Collaro v. West,* 136 F.3d 1304, 1309 (Fed. Cir. 1998) ("Unlike *Ledford*'s 1991 NOD, which specifically identified and thus limited his issue . . . *Collaro's* NOD was not so narrowly limited."); *see also Buckley v. West,* 12 Vet.App. 76, 83 (1998) (NOD expressing "total

disagreement" raised several issues on appeal). The NOD here was clear on its face, and VA did not err in treating it as a dispute with only the effective date. *See Jarvis v. West*, 12 Vet.App. 559, 562 (1999).

Most compelling, the record reflects that in May 2000, the RO issued a rating decision denying an increased evaluation and continuing Appellant's 70 percent disability evaluation because he did not meet the schedular criteria for a 100 percent rating; however, he was also granted total disability based upon individual unemployability (TDIU). There is no NOD or final BVA decision addressing this issue. Generally, two prerequisites for the Court to have jurisdiction over an appeal are a final Board decision and an NOD filed on or after November 18, 1988. *See* 38 U.S.C. § 7251 (note); *see also Hamilton v. Brown,* 4 Vet.App. 528 (1993) (en banc), *aff'd,* 39 F.3d 1574 (Fed. Cir. 1994). The Court should not address the issue because it lacks jurisdiction. The May 2000 rating decision explicitly denied a 100 percent schedular rating to Appellant, but granted TDIU. Until such time as Appellant files an NOD, there can be no appeal to the BVA, and thus, no final Board decision on this issue.

Additionally, the February 1999 statement should be viewed within the context of the factual record. *See Collaro v. West,* 136 F.3d at 1309; *Buckley,* 12 Vet.App. at 83. It appears that what Appellant was seeking was compensation for his inability to work. He stated specifically "I feel my disability prevents me form working and I am unable to function socially. . . I have been unable to work 4+ years." (R. at 571). In March 1999, Appellant submitted his financial information and was examined in July 1999; thus, the RO acted promptly, and responded to Appellant's statement. (SR. at 3-5). Based on the examination, Appellant did not meet the schedular criteria for a total disability rating; he was granted TDIU due to his chronic paranoid schizophrenia. He has received the benefit he sought in February 1999, namely, compensation for his inability to

maintain gainful employment as a result of his psychiatric disability; he receiving substantially the same benefit that he would have received had he met the criteria for total schedular rating.

Alternatively, the Court has adopted the jurisdictional restrictions of the case or controversy rubric under Article Ill of the Constitution of the United States. *See Mokal* v. *Derwinski* 1 Vet.App. 12, 13 (1990); *Aronson v. Brown,* 7 Vet.App. 153, 155 (1994). When there is no case or controversy, or when a once live case or controversy becomes moot. The Court lacks jurisdiction. *Bond v. Derwinski,* 2 Vet.App. 376 (1992). A veteran's overall claim for benefits is comprised of separate issues, including service connection, degree of disability, and effective date. This Court only has jurisdiction to consider an appeal concerning one or more of these issues provided that a NOD has been filed with regard to that particular issue on or after November 18, 1988, the effective date of the Veterans Judicial Review Act, 38 U.S.C. § 7251 note (1994). In addition, pursuant to 38 U.S.C. § 7266(a), in order for a claimant to obtain review in this Court, there must be a final BVA decision on the issue and the person adversely affected by that decision must file an NOA within 120 days after the date on which the BVA decision was mailed. *See Quigley v. Derwinski,* 1 Vet.App. 1 (1989). In the instant appeal, the only issue before the BVA was the question of an earlier effective date as asserted *supra.* While there may be a different basis for a grant of a total schedular rating as opposed to a grant of TDIU, until such time as the TDIU benefit is reduced or withdrawn, any potential impact on Appellant is theoretical; his claim for an increased rating was denied, but he received total compensation. If the Court were to remand the case on the basis suggested by Appellant, given the different factual and legal context in which the new adjudication would take place, such a decision by the Court would amount to an advisory opinion, which the Court is not authorized to do. *See Nagler v.*

Derwinski, 1 Vet.App. 297, 306-07 (1991); *In re Smith,* 7 Vet.App. 89, 94 (1994) (J. Steinberg, dissenting); *see also Waterhouse v. Principi,* 3 Vet.App. 473, 474 (1992) (in order for there to be a case or controversy, the Court "must have the ability to resolve the conflict through the specific relief it provides.")

V. CONCLUSION

To warrant a reversal or remand of a decision, Appellant must demonstrate that the BVA committed error, in its findings of fact, conclusions of law, procedural processes, or articulation of reasons or bases. Appellant in this case has not met that burden.

WHEREFORE, Appellee, the Secretary of Veterans Affairs, respectfully requests that this Court affirm the June 5, 2001, Board decision in this case. The Board's denial of Appellant's claim for an effective date earlier than February 3, 1995, for service connection for a psychiatric disorder is plausible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 29, 2002, a copy of the foregoing was mailed postage prepaid to:

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I hereby certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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